82-710

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No.

In the Supreme Court of the United States.

OCTOBER TERM, 1982.

MARION KAPLAN,
PETITIONER,

v.

SAMUEL W. BLACK,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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Questions Presented.

1. Whether the Massachusetts Courts and the United States District Court, by their adjudications, have deprived the Petitioner, Marion Kaplan, (Marion) of due process of law granted by the Fifth and Fourteenth Amendments by invoking the doctrine of *res judicata* as a result of a judgment rendered in earlier litigation, to which Marion was neither a party, nor represented expressly or impliedly.

2. Is Marion bound by the judgment in a prior case wherein she was a non-party, was not in privity with any of the parties, and was not given a full and fair opportunity to directly or vicariously participate in the presentation of evidence, trial strategy and argument?

3. Is the filing of Marion's present complaint estopped by the judgment in a prior complaint wherein the cause of action litigated in the prior complaint was to set aside a deed based upon mental incapacity, undue influence and fraud, which was of parallel and similar interest to Marion; the present action against her brother, Samuel Black, (Samuel) being one which is a claim for the breach of an advantageous relationship and was not in existence at the time of the prior litigation?

4. Whether the United States Court of Appeals for the First Circuit in refusing to set aside the District Court's decision erred by not allowing the invocation of Federal Constitutional issues which were first raised in the complaint filed with the United States District Court and as a result thereof depriving Marion of her constitutional rights to have her day in court.

5. Are the various United States District Courts and Courts of Appeal acting consistently as it relates to the doctrine of *res judicata*, in particular, the defense of collateral estoppel on matters which were not, or could not have been adjudicated at the time of the prior trial?

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Opinions Below.

The opinion of the United States District Court for the District of Massachusetts appears at Appendix A (A.1). The United States Court of Appeals for the First Circuit affirmed the judgment of the District Court in an opinion which appears as Appendix B (A.5). The opinion of the Superior Court of the Commonwealth of Massachusetts appears as Appendix C (A.8). The opinion of the Appeals Court of the Commonwealth of Massachusetts appears as Appendix D (A.15). The opinion of the Supreme Judicial Court of the Commonwealth of Massachusetts appears as Appendix E (A.17).

Jurisdiction.

The order and judgment of the United States Court of Appeals for the First Circuit were entered on July 26, 1982. *See*, Appendix B (A.5). This petition for certiorari was filed less than 90 days from the date aforesaid. The jurisdiction of this Court is invoked under 28 U.S.C., § 1254(1).

Constitutional Provisions.

U.S. Const. Amend. V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. Amend. XIV, § 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of the Case.

Marion instituted this suit for breach of an advantageous relationship caused by her brother, Respondent, Samuel W. Black, (Samuel) and further alleging that the Courts of the Commonwealth of Massachusetts deprived Marion of her constitutional rights granted to her by the Fifth and Fourteenth Amendments. The Respondent, Samuel, moved to dismiss the complaint on *res judicata*, collateral estoppel and issue preclusion grounds, citing the prior decisions of the Courts of the Commonwealth of Massachusetts in *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978) and *Kaplan* v. *Black*, Mass. App. Adv. Sh. (1981) 1033, 421 N.E.2d 90. In a Memorandum and Order dated January 25, 1982, the United States District Court for the District of Massachusetts granted the Respondent's motion to dismiss. A notice of appeal was filed by the Petitioner on February 24, 1982. The Court of Appeals affirmed the decision of the District Court.

The Petitioner initially filed a suit in the Superior Court of the Commonwealth of Massachusetts alleging that the Respondent caused a breach of an advantageous relationship when he persuaded his mother, Rose Black, by various means, including undue influence and fraud, to grant three parcels of real estate having a value in excess of $300,000.00 to him, which three parcels of real estate were the subject of a contract between Rose and Marion; Rose having agreed to grant the three parcels of real estate to Marion in consideration of Marion settling a will contest and living with Rose and taking care of her for a period in excess of twenty years. In that case, Samuel filed a motion to dismiss which was allowed by the Court, and Marion appealed the allowance of said motion to the Appeals Court and the Supreme Judicial Court of the Commonwealth of Massachusetts. The Judgment of the Superior Court was affirmed in both instances.

Marion subsequently filed this suit in the United States District Court claiming that she was deprived by the Courts of Massachusetts of her United States Constitutional rights granted to her by the Fifth and Fourteenth Amendments. The basis for this jurisdiction is 28 U.S.C., § 1331(a). Samuel filed a motion to dismiss setting forth the defense of *res judicata*, collateral estoppel and issue preclusion on a prior case which was filed by Rose Black, the mother of Marion and Samuel, against Samuel Black, *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978), which motion to dismiss was allowed and affirmed by the Court of Appeals. The complaint by Rose alleged that Samuel took advantage of her mental incapacity, exercised undue influence and perpetrated a fraud upon her, and thus deprived her of her three parcels of real estate. In that case, on one special question submitted to the jury, the jury found that Rose was not mentally incapacitated. No decision was rendered by the jury on the issue of undue influence and fraud. Marion did not contribute toward the expense of that litigation, never participated in the case as a witness, party or intervenor, nor did she have any control over the litigation. The only relationship between Rose and Marion was that of mother and daughter. Samuel claims that the decision in the case of *Black* v. *Black*, *supra*, is a bar to the bringing of the suit by Marion based on the doctrine of *res judicata*. Marion's suit is for breach of an advantageous relationship and is far different from the claims that were made by Rose against Samuel.

No actual trial was held either in the Superior Court of the Commonwealth of Massachusetts or in the United States District Court. Samuel has successfully pressed his motions to dismiss in both jurisdictions.

Argument.

I. Due Process as Granted by the Constitution of the United States Prohibits the Invocation of *Res Judicata* and Its Subordinate Doctrines Under the Circumstances of this Case.

The United States Supreme Court in the case of *Hansberry* v. *Lee*, 311 U.S. 32 (1940) succinctly stated the doctrine of *res judicata* and its relation to the Fifth and Fourteenth Amendments of the Constitution. In that case, 311 U.S. at 41, the Court ruled that:

> State courts are free to attach such descriptive labels to litigations before them as they may choose and to attribute to them such consequences as they think appropriate under the state constitutions and laws, *subject only* to the requirements of the Constitution of the United States. [Emphasis supplied.] But when the judgment of a state court, ascribing to the judgment of another court the binding force and effect of *res judicata*, is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded such notice and opportunity to be heard as are requisite to the due process which the Constitution prescribes. *Western Life Indemnity Co.* v. *Rupp*, 235 U.S. 261, 273.

(Emphasis in original).

Accordingly, it is incumbent upon the Courts to examine this duty on a case-by-case basis and not as a matter of form invoke the Judicial made doctrine of *res judicata* and its subordinates, which doctrine, when wrongfully applied under the guise of judicial economy, deprives a party of her constitutional rights. The District Court judge did not take into consideration that when the doctrine of *res judicata* is exercised,

it deprives a litigant of his day in court and to justify that deprivation, the Court must search each and every facet of the present litigation and attempt to apply those principles which have been enunciated by the Courts to either estop or not estop the present litigant. Those principles have been stated most recently in the matter of *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1970) at page 329.

> Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the *identical issue* which stand squarely against their position.

(Emphasis supplied).

The doctrine of *res judicata* is constantly being refined and invoked by the Courts and its subordinate principles of collateral estoppel, issue preclusion, claim preclusion and virtual representation, but it has not been applied by the Courts that no party shall be estopped or barred from litigating an issue or a claim when a non-party has not been given in the underlying litigation, either directly or indirectly, a full and fair opportunity to present evidence and argument.

Recently, the United States Supreme Court, in *Allen* v. *McCurry*, 449 U.S. 90, 94-95, decided December 9, 1980, has stated that the principle of *res judicata* should be invoked when:

> Under res judicata, a final judgment on the merits of an action precludes the parties of their privies from relitigating issues that were or could have been raised in that action. *Cromwell* v. *County of Sac.* 94, U.S. 351, 352, 24 L.ed. 195. Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a

party to the first case. *Montana* v. *United States*, 440 U.S. 147, 153, 59 L.ed.2d. 210, 99 S.Ct. 970. As this Court and other courts have often recognized, res judicata and collateral estoppel relieve parties of the cost of vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication . . . . But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel *cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case.* (Emphasis supplied.) *Montana* v. *United States, supra*, 440 U.S. at 153, 59 L.ed.2d 210, 99 S.Ct. 970; *Blonder-Tongue Laboratories, Inc.* v. *University of Illinois Foundation, supra*, 402 U.S. at 328-329, 28 L.ed.2d 788, 91 S.Ct. 1434 at page 317 . . . 449 U.S. at 94-95.

In short, the federal courts could step in where the state courts were unable or unwilling to protect federal rights. This understanding of §1983 might well support an exception to res judicata and collateral estoppel where state law did not provide fair procedures for the litigation of constitutional claims, or where a state court failed to even acknowledge the existence of the constitutional principle on which a litigant based his claim. Such an exception, however, would be essentially the same as the important general limit on rules of preclusion that already exist: *Collateral estoppel does not apply where the party against whom an earlier court decision is asserted did not have a full and fair opportunity to litigate the claim or issue decided by the first court.*

Id., at 101. (Emphasis supplied).

Marion is not attempting to relitigate federal issues decided after a full and fair hearing in a state court and claiming that

the state court's decision may have been erroneous. She is attempting to litigate a cause of action not existing at the time of the prior litigation. She was not represented, expressly or impliedly, nor was she privy to any of the parties. True, her future interests were involved, but she was not a party, she did not have the same attorney and, in fact, she did not have any attorney to represent her in the prior litigation.

II. Marion, Not Being in Privity with Her Mother in the Prior Litigation, Should Not Be Estopped.

In order for the Court to estop Marion, the Court had to make a finding that she was in privity with her mother, and then the doctrine of res judicata would apply. This Court in the case of *Sea-Land Services* v. *Gaudet*, 414 U.S. 573, 578-79 (1974) discussed the doctrine of res judicata and the requirements of privity and stated: "Because the respondent's suit involves a different cause of action, it is not precluded by res judicata. For res judicata is only to bar repetitious suits involving the same cause of action."

Marion having a different cause of action, to wit: procuring the breach of an advantageous relationship should not be barred or estopped from having her day in court by the claim that she was in privity with her mother. Privity is sometimes defined as an elusive concept. *See*, *Griffith* v. *Burns*, 570 F.2d 1065 (1st Cir. 1978), at page 1071.

The Court of Appeals in affirming the District Court's allowance of the motion to dismiss is depriving Marion of her constitutional right to not be deprived of her property rights without due process of law. The constitutional issue did not surface until the Supreme Judicial Court had acted. The Court of Appeals in their decision relied on *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974), which is distinguishable from the complaint before the Court. In the *Lovely* case, the parties are the same

and they litigated all of the issues in the State Court, and an attempt was made by the disappointed party to relitigate the same issues except he is now claiming malicious and unconstitutional use of the state process to be evicted from certain premises.

Marion was never a party and is claiming a different cause of action.

The Court of Appeals stated that Marion should have asserted her claim of being deprived of her constitutional rights in the State Court. That ruling of the Court of Appeals presupposes that Marion knew that the State Courts were going to act unconstitutionally.

In this present case, the depriver of the constitutional rights is not a party to the suit, not the executive branch or the legislative branch of any governmental body, but the judicial branch, itself, by wrongfully invoking the doctrine of res judicata and its subordinate principles.

III. Marion Should Not Be Barred, because Her Cause of Action Was Not in Existence until After the Conclusion of the Prior Litigation.

The tort for interference with a prospective advantage is discussed in *Law of Torts*, William L. Prosser, Third Edition, page 475; the earlier law being that there was no recovery when there was an interference with an expected gift or legacy under a will. However, since that time, the doctrine of interference with an advantageous relationship has been expanded and includes the allowance of a claim that is being made by Marion. The District Court judge erred when he stated that this theory has never been applied by the Massachusetts Courts. *See, Monach* v. *Koslowski*, 322 Mass. 466, 78 N.E.2d 4 (1948), it was alleged that the defendant, the daughter of a testator, did tortiously conduct herself so that

she deprived the plaintiff, another daughter, of her inheritance. A demurrer (motion to dismiss) was filed; the objection being that the plaintiff had a plain, complete and adequate remedy at law. The Supreme Judicial Court stated at 322 Mass. 470, 78 N.E.2d 6-7:

> There are strong intimations in our decisions that one who has been deprived of a devise, legacy or gift which a testator or donor would have given to him but for the wrongful interference of another may maintain an action of tort against the latter for the recovery of damages. *Lewis* v. *Corbin*, 195 Mass. 520. *Ross* v. *Wright*, 286 Mass. 269. *Keegan* v. *Norton*, *ante*, 158. It has also been intimated that one ought not to be allowed to profit by his own wrong, and that the property which he acquired by a fraud which prevented another for whom it was intended from receiving it may be impressed with a constructive trust for the benefit of the latter. *Brignati* v. *Medenwald*, 315 Mass. 636, 638. A remedy in equity where the plaintiff may lay hold of the property in the hands of the wrongdoer would be preferable in many cases to an action of tort. See Scott, Trusts, § 489.4; Pomeroy, Equity Jurisprudence (5th ed.) § 1054c. Damages at best are only an approximation of the loss, while relief in equity, by requiring the wrongdoer to transfer to the intended devisee or legatee that which would have gone to him but for the fraud of the former, gives the intended beneficiary exactly what he would have received in the absence of such fraud....
>
> The bill sufficiently alleges that, but for the wrongful interference by the defendants with the attempt of the decedent to make a new will giving the plaintiff one-half of his property, the plaintiff would have received this share of the property, and presents a case where a court of equity will impose a constructive trust for the benefit of the plaintiff to the extent of this share of the property which the defendants have wrongfully acquired.

(citations omitted).

The present cause of action came into existence when the title to the three parcels of real estate ultimately vested in Samuel by the decision of the Supreme Judicial Court in the case of *Black* v. *Black*, *supra*.

The elements of the tort for interference with an advantageous relationship are malice, intent, causal relationship, damage, existence of an advantageous relationship that is legal, that the defendant had knowledge of the existence; and that there would be a likelihood that the beneficiaries of the advantageous relationship would ultimately be given the property. *See*, 45 Am. Jur. 2d, *Interference, II Elements*, § 3-13. Accordingly, until Rose was unable to convey the property by either will or grant, the plaintiff was not damaged, and Rose lost complete control of the property only after the decision by the Supreme Judicial Court, *Black* v. *Black*, *supra*.

The District Court judge, in his Memorandum, states that Marion was attempting for the first time in the United States District Court to litigate a new cause of action, namely, the tortious interference with an advantageous relationship. The judge erred. Marion's complaint in the Superior Court of the Commonwealth of Massachusetts also alleged that there was a tortious interference with an advantageous relationship and, in fact, cited the case of *Monach* v. *Koslowski*, *supra*.

By the allowance of the motion to dismiss, the District Court and the Court of Appeals have deprived Marion of the basic fundamental rights protected by the Constitution of the United States. Marion has never had, even, a vicarious day in court and should not be denied that day.

IV. The Federal Courts In the Various Circuits Are Not Acting Consistently on the Rule of Law Which the First Circuit Court of Appeals Attempted to Set Forth In Its Decision in the Case at Bar.

The Court of Appeals, in its decision, relied on the case of *Lovely* v. *Laliberte*, *supra*. In that action, the plaintiff and the

defendant were the original parties in a case which had a hearing on the merits and the appellant, Lovely, attempted to relitigate the same issues but under the guise of a violation of his civil rights as stated in 42 U.S.C., § 1983. The Court dismissed his action stating that he had the opportunity to raise this issue in the State Courts.

The District Court of New York, in the case of *Friarton Estates* v. *City of New York*, 525 F.Supp. 1250 (D.N.Y. 1981) has ruled that prior state court proceedings cannot bar federal court consideration on matters which were not actually litigated and determined in the state action. Marion has never litigated her cause of action. The *Friarton* case further held that Federal District Courts must act where state procedural law was inadequate to allow full litigation of constitutional claim and where state procedural law, though adequate in theory, was inadequate in practice.

As previously stated in this petition, the State Courts were the deprivers of the Constitutional Rights of Marion and she did not realize that she lost them until after the state court's adjudication which dismissed her complaint.

The Court of Appeals, in the case of *Ross* v. *International Brotherhood of Electrical Workers*, 634 F.2d 453 (9th Cir. 1980) reached a different conclusion from the Court of Appeals in this case. The 9th Circuit Court ruled that a state court judgment against a financial secretary of the local union in his defamation action against vice president of the International was not *res judicata* as to a subsequent claim for alleged tortious interference with advantageous financial relationships with the Local.

The crowning glory of inconsistency on the part of the various Circuit Courts of Appeal as it relates to res judicata is stated in the case of *Tomanio* v. *Board of Regents*, 446 U.S. 478 (1980). In that case, the District Court in New York found that *res judicata* would not bar consideration of a Section 1983 claim in the Federal Court, if the constitutional claim

was not actually litigated and determined in a prior state court proceeding. The Court of Appeals affirmed the lower court's decision and when the matter was heard by the Supreme Court, it was decided on the Statute of Limitation question and there was no discussion as to whether or not the doctrine of *res judicata* was either rightfully or wrongfully applied in that case. It is incumbent upon this Court that the matter presented to the Court in this Petition be heard for many reasons; the first reason being that the collateral estoppel defense set up in Marion's claim is completely contrary to the doctrine of *res judicata*. It has been stated many times that Marion was never a party, nor in privity with her mother; and that the offenders of the deprivation of her constitutional rights was the Judicial Branch of the government by their interpretation of the judge made doctrine of res judicata and in an attempt to effect judicial economy. The second reason to consider this petition is that under the provisions of Rule 17 of the Rules of the Supreme Court, the various circuits have failed to be consistent in their interpretation of whether or not the constitutional question, if it is not raised at the state court level, can be raised in the federal court level. It is a serious conflict between the various Courts of Appeal, and this Court should act and rule in order to avoid future inconsistencies on the part of the Courts of Appeal.

Conclusion.

It is respectfullly submitted to this Court that Marion Kaplan being deprived of her day in court will never have another opportunity to present her claim for deprivation of her constitutional rights to any court, and that a writ of certiorari should issue to review the judgment and opinion of the

United States Court of Appeals for the First Circuit, which for the first time brought into issue whether or not Marion should have raised her constitutional questions at the lower level. The Court of Appeals failed to consider the doctrine of *res judicata* as stated in *Blonder-Tongue* v. *University Foundation, supra.*

Respectfully submitted,

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October, 1982

United States District Court
District of Massachusetts.

MARION KAPLAN,
PLAINTIFF,

v.

SAMUEL W. BLACK,
DEFENDANT.

Civil Action No. 81-1917-MC

MEMORANDUM AND ORDER.

January 25, 1982

McNAUGHT, D.J.

This action came on to be heard on defendant's motion to dismiss the complaint for lack of subject matter jurisdiction and failure to state a claim upon which relief can be granted. The plaintiff, a Massachusetts resident, alleges that the defendant, her brother and a resident of New York, tortiously interfered with an advantageous business relationship between the plaintiff and her mother. This case finds its roots in intrafamily disputes dating to 1956, the year of the death of Joseph Black, the father of the parties in this action. A controversy arose at that time concerning the distribution of Joseph's estate. Plaintiff asserts that her brother's animosity towards her and the numerous intrafamily legal squabbles are due to the fact that she inherited the major portion of their father's estate.

Allegedly at the time of the settlement of Joseph Black's estate, plaintiff reached an agreement with Rose Black, her mother, that in return for plaintiff's payment of $55,000 to the defendant to achieve that settlement, Mrs. Black would devise three parcels of real estate to the plaintiff. Plaintiff asserts that she made that payment to the defendant. During 1966, Mrs. Black executed a will devising the three parcels of property to the plaintiff. Defendant allegedly attempted to have his mother change the will.

On July 14, 1976, Mrs. Black executed deeds conveying the three parcels of property to the defendant. In November of 1976, Mrs. Black brought suit against the defendant alleging that due to her infirm condition she was induced to sign the deeds by means of fraud and undue influence.

Judgment was entered for the defendant when the jury found in answer to a special question that Mrs. Black had sufficient mental capacity to understand the nature and consequences of her actions. Mrs. Black then moved for a new trial, which was denied by the trial judge. The Supreme Judicial Court affirmed that denial. *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978).

In an action brought by the plaintiff against the defendant in Middlesex Superior Court, plaintiff sought a declaration that she was deprived of the parcels of property due to the fraud of her brother. She also sought to have a trust impressed upon the property in her favor and for her benefit and an order requiring defendant to convey the property to her.

Defendant's motion to dismiss in that action was allowed by Judge Hiller Zobel of the Superior Court, who found that the plaintiff was barred from pursuing her action by the result in *Black* v. *Black*, *supra*. The judge found that Mrs. Black and the plaintiff shared interests sufficiently identical to compel the court to treat them as one. In addition, he held that the

jury verdict and the judgment entered required a finding not only that Mrs. Black was competent but also that the defendant had not obtained the property from her through fraud or undue duress. He held the finding of no fraud or undue influence was essential to the judgment in *Black* and precluded recovery in the case before him. "A would-be beneficiary stands as against a proprietary usurper, in the shoes of the testator" ruled Judge Zobel, and thus applied the doctrine of issue preclusion (estoppel). The dismissal was upheld by the Massachusetts Appeals Court in May, 1981. *Kaplan* v. *Black*, 1981 Mass. App. A.S. 1033, 421 N.E.2d 90, (1981). Further appellate review was denied on July 15, 1981.

In the present action, plaintiff alleges that her brother interfered with an advantageous relationship between her and her mother and that her rights under the Fifth and Fourteenth Amendments to the United States Constitution were violated by the decision of Judge Zobel dismissing her complaint in Middlesex Superior Court since she was not allowed the opportunity to litigate her claims against her brother.

Plaintiff is precluded from bringing her claims in this c[illegible] by the doctrine of *claim* preclusion. As recently explained by the First Circuit,

> Claim preclusion — the doctrines of merger and bar — is applied to prevent parties from relitigating the issues arising out of the same transaction; when either party prevails in an action concerning a transaction, all of the plaintiff's possible rights to remedies against the defendant arising out of that transaction are extinguished.

Roy v. *Jasper Corporation*, No. 81-1453, slip op. at 6 (1st Cir. December 14, 1981).

The claim which plaintiff seeks to pursue here arose out of the same transaction which was the subject of the state proceedings in *Black* v. *Black*, *supra*, and *Kaplan* v. *Black*,

supra. The defendant in this case prevailed in those state actions. The plaintiff is now attempting, under the guise of a different claim, to accomplish that which was denied her in two state proceedings.

The suit here is tailored differently since it was last presented in the state courts. It now is called a claim for *tortious interference with an advantageous business relationship*, but the claim is the same as it always was, based upon the same factual allegations, involving the same parties and the same property. The "theory of liability" is given a different label.

So far as I am aware, the theory has never been applied by the Massachusetts Courts to a fact pattern like this. Interference with the relationship of testatrix-beneficiary to the detriment of the beneficiary by another potential beneficiary who hopes to obtain the property by conveyance or demise has not been recognized as a ground for redress in this manner. The brother is viewed as a "lawful competitor" of the owner's largesse unless advantage is secured by undue influence.

At any rate, the plaintiff had the opportunity to allow the Massachusetts Courts to pass upon the validity of such a theory and did not do so.

The claim of deprivation of constitutional rights is hardly worthy of being noted. It has no substance, and cannot provide a basis for this court's exercise of jurisdiction.

For those reasons, defendant's motion to dismiss must be allowed.

[SIGNED]

John J. McNaught
United States District Judge

United States Court of Appeals
For the First Circuit

No. 82-1208.

MARION KAPLAN,
PLAINTIFF, APPELLANT,

v.

SAMUEL W. BLACK,
DEFENDANT, APPELLEE.

JUDGMENT

Entered July 26, 1982

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed.

Double costs are awarded in favor of the appellee.

The requests for damages and for attorney's fees are denied.

By the Court:

[SIGNED]

Dana H. Gallup
Clerk.

[NOT FOR PUBLICATION]

United States Court of Appeals
For the First Circuit

No. 82-1208

MARION KAPLAN,
PLAINTIFF, APPELLANT,

v.

SAMUEL W. BLACK,
DEFENDANT, APPELLEE.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS
[HON. JOHN J. MCNAUGHT, *U.S. District Judge*]

Before
Rosenn,* *Senior Circuit Judge*,
Campbell and Breyer, *Circuit Judges*.

Nicholas J. Decouloc, for appellant.
Elihu Pearlman, with whom *Fred Erlich* was on brief, for appellee.

July 26, 1982

Per Curiam. Appellant appeals from the district court's dismissal of her action against her brother. The district court held the action to be foreclosed by a previous state court judgment growing out of the same matter. *See Kaplan* v. *Black*, 1981 Mass. App. Ct. Adv. Sh. 1027, 421 N.E.2d 90 (1981).

* Of the Third Circuit, sitting by designation.

Appellant concedes that she could not pursue the present federal action if it were merely a repeat performance (possibly under diversity jurisdiction) of the prior state case. She recognizes that a disappointed state litigant may not start all over again in the federal court with the same claim brought in the state court.

Appellant argues, however, that her present claim is different, being in essence a civil rights suit based on the state court's allegedly unconstitutional decision. In particular, appellant insists that the superior court justice acted unconstitutionally when he threw out her state claim on the ground that it was precluded by an earlier state suit initiated by her mother. *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978). This ruling, she says, violated the due process clause of the federal Constitution because it deprived her of her day in court.

This circuit has held, however, that a litigant who could have raised a relevant federal constitutional claim in a state court proceeding he brought, is barred by the doctrine of res judicata from later doing so in a separate proceeding filed for the purpose in federal court. *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), *cert. denied*, 419 U.S. 1038 (1974). If appellant believed that Justice Zobel's ruling was unconstitutional, she could and should have made that contention to Justice Zobel and if necessary to the Massachusetts appellate courts, all of which tribunals were fully competent to hear and adjudicate federal constitutional issues. She did not do so, and was thereafter barred from commencing a new round of lawsuits in the lower federal courts for the purpose, ostensibly, of raising that issue.*

Affirmed with double costs for appellee.

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* We say "ostensibly." In her complaint in the district court appellant nowhere set forth, as all responsible federal litigants should do, the statutory basis for her federal lawsuit. This suggests that her attorney did not know, or perhaps did not care, whether there was a basis for bringing such a suit.

COMMONWEALTH OF MASSACHUSETTS.

SUPERIOR COURT

MIDDLESEX COUNTY No. 79-759

MARIAN KAPLAN

vs.

SAMUEL W. BLACK

MEMORANDUM AND ORDER FOR JUDGMENT.

Litigational Background.

Plaintiff and Defendant are sister and brother. The present litigation, culminating decades of intrafamily hatred, seeks: (1) A declaration that Defendant, by fraud, deprived Plaintiff of certain land ("the Property") devised to her by their mother, Rose Black ("Rose"); (2) The impression of a trust upon the Property in Plaintiff's favor and for her benefit; and (3) An order requiring Defendant to convey the Property to Plaintiff.

After both parties filed pre-trial memoranda and Plaintiff's attorney made an extensive opening, Defendant's attorney moved to dismiss. The parties have also filed through supplemental memoranda.

For purposes of ruling on the motion, the Court assumes all of counsel's statements to be true and regards as drawn all rational inferences which the facts contained in those statements will support. The Court may allow the instant motion only if, after crediting all of such assumptions and inferences, it concludes that Plaintiff cannot establish a right to relief, 8 J. Smith and H. Zobel, *Rules Practice* 58 (1977). Although Massachusetts Rule of Civil Procedure 41 does not explicitly allow a dismissal on the opening in non-jury cases, the Court nonetheless possesses power to entertain such a motion, *ibid.*

Facts.

Rose, who had for many years been estranged from Defendant, had been married to Joseph Black ("Joseph"), who died in 1956. A controversy arose over the distribution of Joseph's estate which Rose and Joseph's three children (Defendant, Plaintiff, and one other child, since deceased) settled in early 1957.

In 1956, during the negotiations leading to the settlement, Rose had told Plaintiff that upon Rose's death, Plaintiff would receive the Property, which included the land and building where Rose resided. This statement was never reduced to writing.

In 1958, Rose told Plaintiff she would construct a three-room addition to her residence if Plaintiff and her family would move into the house. Plaintiff told Rose that she would take care of Rose. Rose again said, as she had earlier, that upon Rose's death, the Property would go to Plaintiff. None of these statements was ever reduced to writing.

In 1966, Rose executed a will ("the 1966 Will") which devised the Property to Plaintiff but mentioned no particular reason for the devise.

On July 14, 1976, Rose executed deeds for the various parcels comprising the Property and delivered them to Defendant, who duly recorded them, thus transferring title to the Property to himself.

On November 4, 1976, Rose commenced an action against Defendant in this Court, *Black v. Black* (Civil No. 76-5579), alleging that on the date of Rose's conveyance to Defendant, she was "so impaired by advanced age and illness that she was temporarily rendered incapable of managing her affairs or of understanding her property rights." The Complaint also alleged that, at the time of the conveyance, "while (Rose) was in a weak and infirm condition and incapable of exercising sound business judgment, (Defendant), the son of (Rose), by means of fraud and undue influence, induced" Rose to sign the deeds.

Early in 1977, Rose drew a new will ("the 1977 Will"), leaving all her estate to Plaintiff.

In the spring of 1977, pursuant to an order of reference from a Justice of this Court, *Black v. Black*, *supra*, was heard by a Master, who on May 31, 1977, filed a detailed report.

On October 6 and 7, 1977, *Black v. Black*, *supra*, was tried to a jury. The presiding justice submitted to the jury the following question: "Did Rose Black on July 14, 1976, at the time when she signed the three deeds in controversy in this case have sufficient mental capacity to fairly understand the nature and consequences of her actions?" The jury answered "Yes," and the presiding justice entered judgment for Defendant, dismissing the action on the merits. Rose seasonably moved for a new trial, which the Court denied; she thereupon appealed. While the litigation was proceeding through the appellate process, Rose died (January, 1978).

By an order of transfer dated August 15, 1978, the Supreme Judicial Court took jurisdiction over the appeal of *Black v. Black*, *supra*. After argument, the Court, on November 1, 1978, entered a rescript opinion which reads, in relevant extract:

> Since the record supports the jury verdict, there was no error in the judge's denial of the plaintiff's motion for a new trial.

The rescript was: "Judgment affirmed," 1978 Mass. Adv. Sh. 2752. Judgment pursuant to the rescript entered on December 1, 1978. The 1977 Will has been admitted to probate by a judge of the Middlesex Division of the Probate Court Department of the Trial Court.

Present Issues.

Plaintiff argues that because a Justice of this Court denied an earlier Motion by Defendant for Summary Judgment, Defendant cannot assert the preclusive effect of *Black v. Black, supra*. However vital the principle of the law-of-the-case, *cf Peterson v. Hopson*, 306 Mass. 597, 601-605 (1940), and despite the strong policy against twice-pressed motions for summary judgment, *see* 8 J. Smith & H. Zobel, *Rules Practice* 347 (1977), the present objection is invalid.

In denying the earlier motion, the Court gave as its reason (written on the face of the motion): "After argument of counsel, examination of the affidavits and attachments thereto, there exists a dispute as to a material issue of fact." The judge, however, did not specify this "material issue." In any event, the Court's statement makes plain that Plaintiff prevailed, not because Defendant's defense was legally insufficient, but because, at the time the Court wrote, at least one material fact was in issue. What was true then may not be true now. Thus we need not pause to consider either the power of one judge to revise the interlocutory order of another, *Peterson v. Hopson, supra*, at 604, or the propriety of such revision, *id.* at 603. In short, the issue before the Court today is not the issue which the earlier decision resolved. One must recall that the present question does not arise on a motion for summary judgment. A motion to dis-

miss after a Plaintiff's opening is, in degree and kind, more like a motion for a directed verdict than a motion for summary judgment. Because the Court credits all facts and inference in the plaintiff's favor, no factual disputes remain for consideration. Whatever issue of fact the judge who denied summary judgment may have discerned, by the close of Plaintiff's opening, that issue had either disappeared or been (for present purposes) resolved in Plaintiff's favor. Defendant's failure to win summary judgment does not guarantee Plaintiff the right to a full evidentiary trial. If the facts and inferences contained in Plaintiff's opening could not establish a legal basis for recovery, dismissal was not merely proper, but necessary.

We need consider, therefore, only whether the judgment in *Black v. Black, supra*, precludes Plaintiff's pursuit of Defendant. The key questions here are: (1) Can "the same persona...be conceived to have litigated in both actions"; and (2) Was the determination which Defendant seeks to import from *Black v. Black, supra*, not only litigated there, but essential to the judgment, *Rudow v. Fogel*, 1978 Mass. Adv. Sh. 2810, 2814.

First, the nub of the present complaint is that Defendant "by undue influence and fraud perpetrated upon (Rose) prevented (Plaintiff) from receiving" the Property through the devise in the 1966 will. A would-be beneficiary stands, as against a proprietary usurper, in the shoes of the testator, *see* Restatement, *Property* §87; *Old Dominion Copper Mining and Smelting Co. v. Bigelow*, 203 Mass. 159, 218 (1909); this is a variant of the principle that a successor in interest is in privity to her predecessor, *MacCormac v. Murphy*, 322 Mass. 228, 231 (1948), and cases cited. Rose and Plaintiff shared interests sufficiently identical to permit (or, indeed, compel) the Court's treating them as one.

Second, Defendant argues that *Black v. Black*, *supra*, determined: (1) That Rose was mentally competent when she conveyed the Property to Defendant; and (2) That Defendant did not obtain the conveyance through fraud. Defendant is correct.

Even though *Black v. Black*, *supra*, went to the jury on one special question, the judgment concluded all issues within the pleadings. "If...the court omits any issue of fact raised by the pleadings or by the evidence, each party waives his right to a trial by jury of the issue so omitted unless before the jury retires he demands its submission to the jury. As to an issue omitted without such demand the court may make a finding; or, if it fails to do so, it shall be deemed to have made a finding in accord with the judgment on the special verdict", Mass. R. Civ. P. 49(a). The relevant language of Rule 49(a), that is to say, achieves in this case the same result, flowing from the customary truism that precludes retrying, not only issues which *were* actually tried in the earlier litigation, but issues which *could* have been tried, *Pan-American Match, Inc. v. Sears, Roebuck & Co.*, 454 F.2d 871, 875 (1st Cir. 1972), collecting cases.

The pleadings in *Black v. Black*, *supra*, raised the issue of fraud. Thus the failure of either party to ask the Court to submit to the jury a specific question pertaining to the fraud issue left the matter for the Court's decision. The Court having failed to make any such finding, we must assume, for all purposes, that the Court did make a finding compatible with the judgment which it entered (for the Defendant) on the special verdict. That judgment laid finally to rest, as between Rose and Defendant, all questions of fraud in the inducement of the conveyance of the Property.

Third, the gist of the Complaint in *Black v. Black*, *supra*, was an allegation that "while (Rose) was in a weak and infirm condition and incapable of exercising sound business judgment, (Defendant), by means of fraud and undue influence"

induced conveyance of the Property. A judgment for Defendant would require not merely a finding that, at the time of the conveyance, Rose was competent, but also a finding that Defendant had not obtained the Property from her through chicane. That is, a finding of competency, coupled with a finding of fraud/undue influence, would have required a judgment for Rose; a finding of incompetency (whatever the finding on the other issue) would have effected the same result.

Thus it is clear that the finding of no-fraud/undue influence which Defendant seeks to transfuse into the present litigation from *Black v. Black*, *supra*, was "essential to the judgment" there, *Rudow v. Fogel*, *supra*, at 2814. That being so, the judgment in Black v. Black, *supra*, precludes Plaintiff's recovery here.[1]

Accordingly, it is Ordered, that the complaint herein be dismissed, costs to the Defendant.

[SIGNED]

Hiller B. Zobel
Justice of the Superior Court

Dated: May 28, 1980

[1] It is thus unnecessary to consider whether the Statute of Frauds, M.G.L.A. c. 259, §§1, 5, in any way also precludes Plaintiff's recovery.

RESCRIPT OPINION.

MARION KAPLAN *vs.* SAMUEL W. BLACK (and a companion case). May 29, 1981. 1. The action numbered 79-759 was properly dismissed for the reasons given by the judge in his comprehensive and carefully reasoned memorandum and order for judgment. In addition to the authorities cited by the judge, see *Willett* v. *Webster*, 337 Mass. 98, 102 (1958); *Fassas* v. *First Bank & Trust Co.*, 353 Mass. 628, 629-630 (1968); *Dwight* v. *Dwight*, 371 Mass. 424, 427-430 (1976); *Boyd* v. *Jamaica Plain Co-op. Bank*, 7 Mass. App. Ct. 153, 160-164 (1979);[a] *Morganelli* v. *Building Inspector of Canton*, 7 Mass. App. Ct. 475, 479-480 (1979).[b] As dismissal was required by the applicable principles of law, we need not decide whether the judge (a) was acting under Mass.R.Civ.P. 12(c), 365 Mass. 756 (1974), (b) was exercising his power to dismiss at the close of the plaintiff's opening statement (see Smith & Zobel, Rules Practice § 41.9 [1977]), or (c) was correcting the earlier mistake made by a different judge who had denied the defendant's motion under Mass.R.Civ.P. 56, 365 Mass. 824 (1974). See *Peterson* v. *Hopson*, 306 Mass. 597, 601-605 (1940); *Coolidge Bank & Trust Co.* v. *First Ipswich Co.*, Mass. App. Ct. , (1981);[c] *Genesco, Inc.* v. *Kaufman*, Mass. App. Ct. , - (1981).[d] 2. In the action numbered 79-814, it does not appear that any question was raised below (see, e.g., *John B. Deary, Inc.* v. *Crane*, 4 Mass. App. Ct. 719, 724 [1976]) as to whether summary process was

[a] Mass. App. Ct. Adv. Sh. (1979) 337, 345-351.
[b] Mass. App. Ct. Adv. Sh. (1979) 811, 816-818.
[c] Mass. App. Ct. Adv. Sh. (1981) 217, 218.
[d] Mass. App. Ct. Adv. Sh. (1981) 718, 721-722.

the proper vehicle for recovering possession of premises which the courts had already determined were the property of Samuel W. Black. See *Black* v. *Black*, 376 Mass. 929 (1978).[e] To the contrary, counsel expressly agreed with the judge that the result in No. 79-759 would control the result in No. 79-814. 3. Both judgments are affirmed, with double costs (G.L. c. 211A, § 15); Black is to have counsel fees on appeal (see *Katz* v. *Savitsky*, Mass. App. Ct. , n.8 [1980];[f] *Leventhal* v. *American Discount Corp.*, Mass. App. Ct. , - [1981][g]) in the amount of $1,000, with an execution for that amount to issue out of the Superior Court in the action numbered 79-759.

So ordered.

Nicholas J. Decoulos (*Louis J. Muggeo* with him) for Marion Kaplan & another.

Elihu Pearlman (*Fred Erlich* with him) for Samuel W. Black.

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[e] Mass. Adv. Sh. (1978) 2752.

[f] Mass. App. Ct. Adv. Sh. (1980) 2113, 2119 n.8.

[g] Mass. App. Ct. Adv. Sh. (1981) 535, 536-537.

ORDERS.

The Supreme Judicial Court has made the following orders with respect to applications for leave to obtain further appellate review:

July 15, 1981.

Granted:

COMMONWEALTH *vs.* RICHARD N. CHASE. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1035.

Denied:

CARE AND PROTECTION OF TWO MINORS. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1094.

CHOMERICS, INC. *vs.* JOHN E. EHRREICH & another. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1040.

LOUIS B. CLOWS & another *vs.* PLANNING BOARD OF MIDDLETON. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1213.

COMMONWEALTH *vs.* ROBERT A. BAILEY. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1182.

COMMONWEALTH *vs.* JASPER DEERAN. Reported below: Mass. App. Ct. Adv. Sh. (1980) 1933.

COMMONWEALTH *vs.* ARTHUR F. JOSEPH, III. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1028.

COMMONWEALTH *vs.* ROBERT MCQUADE. Reported below: Mass. App. Ct. Adv. Sh. (1980) 1775.

JOHN D. AHERN CO., INC. *vs.* TRUSTEES OF BOSTON UNIVERSITY (and a companion case). Reported below: Mass. App. Ct. Adv. Sh. (1981) 1108. MR. JUSTICE BRAUCHER and MR. JUSTICE LIACOS recused.

MARION KAPLAN *vs.* SAMUEL W. BLACK (and a companion case). Reported below: Mass. App. Ct. Adv. Sh. (1981) 1033.

JOSEPH W. MACDONALD *vs.* ROBERT S. HAWKER. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1014. MR. JUSTICE NOLAN recused.

LAWRENCE SMITH & others *vs.* ERNEST C. CAGGIANO. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1101.

July 29, 1981

Denied:

COMMONWEALTH *vs.* JOHN K. SMAJKIEWICZ. Reported below: Mass. App. Ct. Adv. Sh. (1981) 1025.

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No. 82-710

In the
Supreme Court of the United States.

OCTOBER TERM, 1982.

MARION KAPLAN,
PETITIONER,

v.

SAMUEL W. BLACK,
RESPONDENT.

Respondent's Brief in Opposition to Petitioner's Request for a Review on Writ of Certiorari to the United States Court of Appeals for the First Circuit.

ELIHU PEARLMAN,
FRED ERLICH,
6 Pleasant Street,
Malden, Massachusetts 02148.
(617) 324-7100

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

Question Presented for Review.

Whether the petition for writ of certiorari should be denied based upon the fact that the decision by the United States Court of Appeals for the First Circuit affirming the determination of the United States District Court justice in allowing Samuel W. Black's motion to dismiss was appropriate.

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No. .

In the Supreme Court of the United States.

October Term, 1982.

MARION KAPLAN,
Petitioner,

v.

SAMUEL W. BLACK,
Respondent.

Respondent's Brief in Opposition to Petitioner's Request for a Review on Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Statement of the Case.

Rose Black, mother of both Marion and Samuel, was married to Joseph Black, who passed away in 1956. There was a dispute among the heirs of the estate which was ultimately settled in 1957. This dispute fostered considerable sibling acrimony.

In 1958, Rose constructed a three-room addition to her home in Malden and allowed Marion and her family to live in her home at 18 Pierce Street, rent-free, while Rose lived in the

three-room addition. Marion agreed to remain at the home with her mother until Rose's death.

In 1966, Rose executed a will in which she purported to leave the properties at 4 Newbury Street, West Peabody, Massachusetts, 1078 Main Street, Reading, Massachusetts, and 18 Pierce Street, Malden, Massachusetts, to her daughter Marion.

On July 14, 1976, Rose executed deeds for these three parcels to her son Samuel, and delivered these deeds to him. Samuel recorded these deeds in the appropriate registries of deeds.

On November 4, 1976, Rose entered an action in the superior court, *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978), seeking to rescind the execution of these deeds on the basis of an alleged fraud and undue influence exercised by Samuel on Rose while she was in a weak and infirm condition.

All issues that were in the initial action, including fraud, undue influence and mental incompetency were tried before a jury on October 6 and 7, 1977 (A. 10). The following special question was submitted to the jury upon agreement of counsel, "Did Rose Black, on July 14, 1976, at the time when she signed the three deeds in controversy in this case have sufficient mental capacity to fairly understand the nature and consequences of her actions?" The jury's answer was "yes", whereupon judgment was entered for defendant Samuel (A. 10).

The Supreme Judicial Court took jurisdiction of the case and affirmed the judgment for Samuel, further elaborating in a rescript opinion dated December 1, 1978 (A. 11).

Rose Black's daughter, Marion Kaplan, beneficiary under Rose's will, part of whose bequest was adeemed by the deeding of property from Rose to Samuel, subsequently filed suit in the Superior Court of Middlesex County alleging a breach of advantageous relationship due to an alleged fraud and undue influence exercised over Rose by Samuel (A. 8). Samuel filed a motion to dismiss based upon the doctrines of res judicata and collateral estoppel. Said motion to dismiss was allowed by the

court and the complaint was dismissed based on these grounds (A. 11-14). Marion appealed the allowance of said motion to the Massachusetts Appeals Court and the Supreme Judicial Court of the Commonwealth of Massachusetts. The judgment of the superior court was affirmed in both cases (A. 15-17).

Marion thereupon brought the present action in the United States District Court for the District of Massachusetts alleging the very same breach of an advantageous and contractual relationship between Rose and Marion by Samuel and further alleging a denial of rights under the Fifth and Fourteenth Amendments of the United States Constitution due to the decisions adverse to Marion's position. Samuel filed another motion to dismiss which was allowed by United States District Court Justice John J. McNaught (A. 1-4). Marion claimed an appeal in which Judge McNaught's opinion was affirmed by the justices of the United States Court of Appeals for the First Circuit. Marion seeks a review on writ of certiorari which Samuel opposes.

Argument.

I. The Decision of the United States Court of Appeals for the First Circuit is Not in Conflict with the Decision of Another Federal Court of Appeals on the Issues of Res Judicata and Failure to Assert Constitutional Rights.

Rule 17 (1) (a) of the Supreme Court Rules of Procedure states that a review on writ of certiorari will be granted when a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter. Petitioner Marion Kaplan relies on this consideration in an attempt to have the decision of the United States

Court of Appeals for the First Circuit reviewed by this Honorable Court. The First Circuit Court cited the case of *Lovely* v. *Laliberte*, 498 F.2d 1261, 1263 (1st Cir.), cert. denied, 419 U.S. 1038 (1974) for the proposition that "a litigant who could have raised a relevant federal constitutional claim in a state court proceeding he brought is barred by the doctrine of res judicata from later doing so in a separate proceeding filed for the purpose in federal court." (A. 7.) The First Circuit Court goes on to say that, if Marion had believed that Middlesex Superior Court Judge Hiller Zobel's ruling (A. 8) had been unconstitutional, this assertion could have been made to Judge Zobel, the Massachusetts Appeals Court or Supreme Judicial Court of the Commonwealth of Massachusetts. At no time was this done by Marion. An examination of the cases cited by Marion that are allegedly at odds with this First Circuit Court decision indicate that they are in accord rather than in conflict with the case of *Lovely* v. *Laliberte*, *supra*.

None of the three cases cited by Marion as contrary to *Lovely* v. *Laliberte*, *supra*, *Friarton Estates* v. *City of New York*, 525 F. Supp. 1250 (D.N.Y. 1981), *Ross* v. *International Brotherhood of Electrical Workers*, 634 F.2d 453 (9th Cir. 1980), and *Tomanio* v. *Board of Regents*, 446 U.S. 478 (1980), is at all in point with the case at bar either on the law or the facts, nor is any contrary to the *Lovely* holding. The *Tomanio* footnote to the *Lombard* case deals with a true civil rights plaintiff rather than a frustrated beneficiary seeking yet another forum to have her adeemed bequest restored. Furthermore, Marion's interpretation of the holding of *Friarton Estates*, *supra*, says that the court "has ruled that prior state court proceedings cannot bar federal court consideration on matters which were not actually litigated and determined in the state action" (Pet. Br. 12). The crux of this entire litigation from the view of respondent Samuel W. Black and the point with which the Massachusetts Supreme Judicial Court has agreed on two occasions,

the Appeals Court of Massachusetts has agreed, the Middlesex Superior Court of Massachusetts has twice agreed, the United States District Court for the District of Massachusetts has agreed, and the United States Court of Appeals for the First Circuit has agreed, is that Marion has already had her case litigated and determined or had the opportunity to have her cause of action litigated and failed to do so.

The First Circuit Court in its opinion states at A. 7 that:

> [a]ppellant [Marion] concedes that she could not pursue the present federal action if it were merely a repeat performance . . . of the prior state case. She recognizes that a disappointed state litigant may not start all over again in the federal court with the same claim brought in the state court.

Yet this is precisely what Marion has sought to do in the federal court system. She alleges a deprivation of her rights by the judicial system on the very same facts with the very same parties as in the state court action. All Marion does is give the cause of action another name and allege constitutional deprivations which have no basis in law or fact in the attempt to have any federal court rule on its merits. These merits were originally ruled on by the superior court in Massachusetts in *Black* v. *Black*, 376 Mass. 929, 381 N.E.2d 1304 (1978), and any alleged constitutional deprivation could most certainly have been raised in the Massachusetts appellate court system; none was. However, as will next be discussed, the merits of Marion's case dictate that the issue of timely raising of constitutional issues need not even be reached.

II. Marion Kaplan was in Privity with Rose Black in the Action of *Black* v. *Black*.

As indicated in Judge Zobel's opinion (A. 8-14), Marion was in privity with Rose Black in that Marion was the proposed beneficiary, pursuant to Rose's will, of the three parcels of real estate in issue in this case. When Rose conveyed these properties to Samuel and then brought suit to attempt to rescind the conveyance in *Black* v. *Black*, *supra*, Marion was clearly an unnamed plaintiff in the action. "A would-be beneficiary stands, as against a proprietary usurper, in the shoes of the testator" (A. 12), appropriately stated Judge Zobel. As a matter of law, Marion was, therefore, in privity with her mother in the action of *Black* v. *Black*, *supra*. To allow Marion to have the opportunity for a full evidentiary hearing on these same facts would enable in every instance not only the donor of property who changed his/her mind to get a full trial as to the circumstances of the transfer, but also allow the original proposed beneficiary to relitigate the very same facts with the very same interests involved under the guise of another cause of action such as an alleged breach of a contractual relationship.

III. There is an Identity of Issues Between the Case at Bar and the Prior Litigation.

There is also an identity of issues in Marion's proposed action sufficient to invoke the doctrine of res judicata as stated by Judge McNaught in citing *Roy* v. *Jasper Corporation*, No. 81-1453, slip. op. at 6 (1st Cir. December 14, 1981) at A. 3:

> Claim preclusion — the doctrines of merger and bar — is applied to prevent parties from relitigating the issues arising out of the same transaction; when either party

> prevails in an action concerning a transaction, all of the plaintiff's possible rights to remedies against the defendant arising out of that transaction are extinguished.

Any question of an alleged breach of a contractual relationship was determined by the decision in *Black* v. *Black, supra.* "Under res judicata, a final judgment on the merits of an action precludes the parties *or their privies from relitigating issues that were or could have been raised in that action. . .*" *Cromwell* v. *County of Sac.*, 94 U.S. 351, 352 (1876) (emphasis added).

Marion seeks by naming her new cause of action an interference with an advantageous relationship, to maintain that this new action is totally independent of the original judgment in *Black* v. *Black, supra.* As stated by United States District Court Judge McNaught in his memorandum and order at A. 3-4:

> The claim which plaintiff [Marion] seeks to pursue here arose out of the same transaction which was the subject of the state proceedings in *Black* v. *Black, supra,* and *Kaplan* v. *Black,* [Mass. App. Ct. Adv. Sh. (1981) 1033, 421 N.E.2d 90]. The defendant in this case prevailed in those state actions. The plaintiff is now attempting, under the guise of a different claim, to accomplish that which was denied her in two state proceedings.
>
> The suit here is tailored differently since it was last presented in the state courts. It is now called a claim for *tortious interference with an advantageous business relationship,* but the claim is the same as it always was, based upon the same factual allegations, involving the same parties and the same property. The "theory of liability" is given a different label.

Marion relies heavily on the case of *Blonder-Tongue* v. *University Foundation*, 402 U.S. 313 (1970) and for the proposition that Marion never appeared in the prior action (Pet. Br. 6) and the case of *Allen* v. *McCurry*, 449 U.S. 90 (1980), for the proposition that Marion did not have a full and fair opportunity to litigate her claim in the prior action of *Black* v. *Black*, *supra*. In citing these cases, in presenting her argument (Pet. Br. 8) and even in her statement of questions presented (Pet. Br. 2) Marion states that she was not in privity with her mother in the prior litigation and, therefore, should not be estopped from litigating her claim. At no time in this petition nor on brief in any other phase of this proceeding has Marion ever cited one case for the proposition that she was not in privity with her mother in *Black* v. *Black*, *supra*. Mere recitation of the fact that Marion was not a named party to the action nor physically appeared in the action cannot alter the legal determination that Marion was in fact in privity with her mother, nor that Marion cannot assert another "theory of liability" in an attempt to get Marion another day in court to relitigate the very same issues.

IV. Petitioner Fails to Allege a Substantive Constitutional Deprivation Worthy of Review by this Honorable Court.

Judge McNaught of the United States District Court for the First Circuit said at A. 4: "The claim of deprivation of constitutional rights is hardly worthy of being noted. It has no substance, and cannot provide a basis for this court's exercise of jurisdiction."

Marion appears to suggest that, because there was a decision contrary to her position reached in every available court in the Commonwealth of Massachusetts and in the United States Dis-

trict Court and Court of Appeals, she was deprived of her constitutional rights under the Fifth and Fourteenth Amendments. This argument is specious, to be kind. If Marion was never allowed to reach the merits of her purported cause of action in this matter, it is merely because each and every court having heard and reviewed this matter has properly applied the state of the law in its jurisdiction to the case at bar. Marion has had the opportunity to assert her rights to the fullest extent through a vast number of dilatory appeals, a course of action which has been to the long-standing economic detriment of Samuel, who was deeded the property on July 14, 1976, and had a decision rendered in his favor in *Black* v. *Black*, *supra*, over five years ago, on October 7, 1977.

Conclusion.

It is respectfully submitted to this Honorable Court that, pursuant to the character of reasons listed in the Supreme Court Rules of Procedure, Rule 17, there is no decision in the prior proceedings in this case which has been rendered in conflict with any federal court of appeals decision on the same matter, nor is there a special and important reason for reviewing this matter pursuant to this Honorable Court's judicial discretion.

The respondent, Samuel W. Black, respectfully requests that this Honorable Court deny petitioner's petition for a review on writ of certiorari, thus affirming the decision of the United States Court of Appeals for the First Circuit which affirmed the decision of the United States District Court in

allowing Samuel W. Black's motion to dismiss the complaint of Marion Kaplan.

Respectfully submitted,

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